SUPERINTENDENT OF LANDS & SURVEYS, SAMARAHAN DIVISION & ANOR

v.

ABAS NAUN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
MOHAMED APANDI ALI JCA
MOHTARUDIN BAKI JCA
[CIVIL APPEALS NO: Q-01-387-2009 & Q-01-(IM)-434-2009]
1 APRIL 2014

CIVIL PROCEDURE: *Mode of commencement - Challenging act of public authority - Validity of issuance of provisional lease by public authority - Whether filing of writs of summon proper - Whether should have been by way of judicial review - Defending native customary rights - Whether defensive action - Whether permissible under private law*

CONSTITUTIONAL LAW: *Fundamental liberties - Deprivation - Rights to property - Whether involved public law - Whether challenge against act of public authority amounted to defensive action - Whether filing of writs of summon proper - Whether permissible under private law*

The respondents in the two appeals herein were natives who challenged the validity of provisional leases of a few lots of land in various districts in the Samarahan Division. The respondents commenced the challenge by writ of summons and statement of claim. The High Court ruled in favour of the respondents and allowed them to proceed with their respective claims by writ actions. The issue in the present appeals was whether the respondents' action of filing writs of summons was proper as the action of challenging the public act of a public authority should be by way of judicial review.

Held (dismissing appeals)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The subject matter involved rights to property and the court viewed the issue in a prismatic approach, having regard to the fundamental liberties as enshrined in art. 13(1) of the Federal Constitution which provided that no person shall be deprived of property save in accordance with the law. (para 8)

A **(2)** The respondents' challenge on the issuance of the provisional leases was an act of defending themselves against the action of a public authority. In such an act, even though it involved public law, the defensive action is permissible under private law. This is in reality an exception to the general principle
B enunciated in *O'Reilly v. Mackman*. In view of the recent plethora of cases that held that native customary rights and claims to native land can be commenced by way of writ action, the issue is now trite law. (paras 9 & 14)

C *Obiter*

(1) In the spirit of the fundamental rights to property, the courts should be very slow to close the doors to justice when such rights are involved. In fact, the courts should open the door wider in such circumstances. (para 15)
D

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden dalam kedua-dua rayuan ini merupakan anak negeri yang mencabar kesahan pajakan sementara beberapa lot
E tanah di beberapa daerah di dalam Kawasan Samarahan. Responden-responden memulakan cabaran tersebut melalui writ saman dan penyata tuntutan. Mahkamah Tinggi membuat keputusan yang memihak kepada responden-responden dan membenarkan mereka meneruskan dengan tuntutan masing-masing
F melalui tindakan writ. Isu dalam rayuan-rayuan ini adalah sama ada tindakan responden-responden memfailkan writ saman adalah wajar kerana tindakan mencabar tindakan awam oleh pihak berkuasa awam sepatutnya dibuat secara semakan kehakiman.

G **Diputuskan (menolak rayuan-rayuan)**
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Hal perkara ini melibatkan hak-hak kepada hartanah dan mahkamah meneliti isu ini dengan pendekatan prismatik,
H mempertimbangkan kebebasan asasi yang diperuntukkan dalam per. 13(1) Perlembagaan Persekutuan yang memperuntukkan bahawa tiada seorang pun yang wajar dinafikan hartanahnya kecuali menurut undang-undang.

I **(2)** Cabaran responden-responden terhadap pengeluaran pajakan sementara adalah tindakan mempertahankan diri mereka daripada tindakan pihak berkuasa awam. Dalam tindakan

sedemikian, walaupun ia melibatkan undang-undang awam, tindakan mempertahankan diri adalah dibenarkan di bawah undang-undang persendirian. Ini sebenarnya adalah pengecualian kepada prinsip am yang diperuntukkan dalam kes *O'Reilly v. Mackman*. Berikutan beberapa kes baru-baru ini yang memutuskan bahawa hak adat anak negeri dan tuntutan kepada tanah anak negeri boleh dimulakan dengan tindakan writ, isu tersebut kini menjadi undang-undang matan.

Obiter

(1) Berdasarkan semangat kebebasan asasi kepada hartanah, mahkamah sepatutnya tidak menutup pintunya terhadap keadilan apabila melibatkan hak-hak yang sedemikian. Malah, mahkamah-mahkamah sepatutnya membuka pintunya dengan lebih luas dalam hal keadaan sedemikian.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880 CA ***(refd)***

Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 AC 624 ***(foll)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***

Wandsworth London Borough Council v. Winder [1985] AC 461 ***(foll)***

Legislation referred to:

Federal Constitution, art. 13(1)
Rules of the High Court 1980, O. 53
Sarawak Land Code, s. 28

For the appellants - Joseph Chioh (Mc Willyn Jiok with him); State Legal Officer
For the respondents - Baru Bian; M/s Baru Bain

[Editor's note: For the High Court judgment, please see Abas Naun & Ors v. Jangkar Plantation Sdn Bhd & Ors [2009] 1 LNS 1105.]

Reported by S Barathi

A

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

B **[1]** The two appeals before the Court of Appeal involved the same appellants, namely the Superintendent of Lands and Surveys, Samarahan Division and others. The respondents in the first appeal (Q-01-387-2009) are Abas Ak Naun and five others and in the second appeal (Q-01-(IM)-434-2009) the respondents are C James Jagah Ak Nyadak and 12 others. The facts for both cases are similar. The respondents Abas Ak Naun and James Jagah Ak Nyadak are natives who challenged the validity of provisional leases of a few lots of land in various districts in the Samarahan division.

D

[2] Both respondents commenced the challenge by writ of summons and statement of claim. For Abas Ak Naun the writ action is Suit No. 22-115-2005-I and for James Jagah Ak Nyadak it is Suit No. 22-220-2008-I.

E

[3] The learned High Court Judge ruled in favour of the respondents, and allowed them to proceed with their respective claims by writ actions.

The Issue Before The Court

F

[4] The main bone of contention before this court can be narrowed down to one issue only, namely whether the respondents' action of filing writs of summons is improper and an abuse of the proceed of the court as the action being in fact G challenging the public act carried out by a public authority and that such challenge should be by way of judicial review.

The Appellants' Contentions

[5] Learned counsel for the appellants in their submissions H contended that:

(a) The challenge to the validity of provisional leases that were issued by a public authority is an issue of public law;

I (b) The issuance of the said provisional leases were made under the provisions of s. 28 of the Sarawak Land Code and as the first appellant is a public officer acting for a public authority, such decision can only be challenged through the process of judicial review;

(c) That native customary rights were given recognition by statute and therefore such rights are based on public law and not private law; and

(d) That on the basis of the pleadings in the statements of claim, they relate to alleged breaches of natural justice, illegality and breach of fundamental liberties and therefore the issues therein ought to be dealt with through judicial review of the decision making process of the first appellant.

[6] In support of their contentions, the appellants relied on the case law authorities of *O'Reilly v. Mackman* [1983] 2 AC 237 and the High Court decision in *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ 775.

The Respondents' Contentions

[7] The learned counsel for the respondents countered that:

(a) The effect and applicability of O. 53 of the Rules of the High Court 1980 ("RHC") does not preclude for the matter to be classified as exceptions to the principle in *O'Reilly*'s case.

(b) That the common law respects the pre-existence of rights under native laws or customs and therefore the native customary rights do not owe their existence to any statute; and

(c) That native customary right is a private right to property and that any statute cannot nullify such rights which has be acquired or recognized prior to the coming into force of a statute, in this case the Land Settlement Ordinance of 1933.

Our Analysis

[8] After reading the written submissions and upon perusal of the records of appeal, we approached the appeals by noting that the subject-matter involved rights to property. On that basis we are inclined to view the issue in a prismatic approach, having regard to the fundamental liberties as enshrined in art. 13(1) of the Federal Constitution which reads: "No person shall be deprived of property save in accordance with law."

[9] It is our judgment that the respondents' challenge on the issuance of the provisional leases is an act of defending themselves against the action of a public authority. In such an act, even though it involved public law, the defensive action is permissible under private law. This is in reality an exception to the general principle enunciated in *O'Reilly*. On this approach, we are guided by the House of Lords' decisions in *Wandsworth London Borough Council v. Winder* [1985] AC 461 and *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624. In the latter case, it was held that: when a litigant had a private law right, in relation to a matter which involved on issue of public law, he was not precluded from pursuing his private law right.

[10] At the local scene, the Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, through the judgment of James Foong FCJ held as follows:

> However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for his purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* and repeated in *YAB Dato' Dr Zambry*. However, like all general rule, there are exceptions. This again was recognized by Lord Diplock in *O'Reilly v. Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim **for infringement of a right of the plaintiff arising under private law** or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v. Mackman*. The circumstances in *YAB Dato' Dr Zambry* is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that

affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 of the RHC.

We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. **If it is a mixture of public and private law then the court must ascertain which of the two is more predominant.** If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. *But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.* Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. **Much depends on the facts of the case** ... . (emphasis added)

[11] Another case on point, decided by the Federal Court recently, is the case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766, where through Richard Malanjum CJSS, noted as follows:

127. I would like to make another note on the use of Order 53 of the Rules of the High Court 1980 in cases involving native customary rights. This point was touched upon *Jalang*'s case by the Courts below. With respect, I find that it is highly unfair and prejudicial to insist upon the natives to proceed by way of Order 53 when they seek to enforce a constitutional right by way of a declaration to that effect.

128. Although it does, to a certain extent, fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognized both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v. Mackman* [1982] 3 All ER 1124 principle.

129. I therefore prefer to approve the recent the decision of the High Court in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 to that of *Shaharuddin Ali & Anor v. Superintendent of Lands & Surveys, Kuching Division & Anor* [2004] 4 CLJ 775.

[12] The case of *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, is a well-written judgment of Rhodzariah Bujang (now High Court Judge) which *inter alia* when faced with the same issue held that:

> [10] After giving the matter much thought, I am of the view that cases involving claims of native customary rights such as this one are an exception to the *O'Reilly*'s principle. I came to this decision because the prosecution of the plaintiffs' right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states - Sabah and Sarawak. For the natives in these two states, - their rights to the land - to forage, to hunt, to fish and to cultivate the land, for it is not just a place to build a home but their very livelihood - this right is handed down one generation to the next. To tie them down to the *O'Reilly*'s principle when more often than not they would only know about the transgressions of their right when the land had already been dealt with by the state authorities (as in this case) is an irreparable injustice which the Law Lords in *O'Reilly*, I am sure would never have intended.
>
> [11] In holding that native customary rights cases are an exception to the *O'Reilly*'s principle I find support in the decision of the House of Lords in *Gillick v. West Norfolk & Wisbech Area Health Authority* [1986] AC 112. In the said case the plaintiff, a mother of five young daughters challenged, by way of a writ action, a decision of the Health authority in allowing doctors, in some circumstances, to give contraceptive advice and treatment to girls under 16 years of age without parental consent. Though her claim was dismissed on merits, the House of Lords agreed that the procedure she adopted was right and one of the reasons given for that was in the words of Lord Scarman:
>
> > ... **the private law content** of her claim was so great as to make her case an exception to the general rule. (emphasis added).
>
> [12] It cannot be denied that the assertions by the plaintiff of having native customary rights over the land is embedded in private law; much more private, I would say than Mrs Gillick's concern for the morality of her young daughters who were not in any imminent danger of being prescribed contraceptive pills and being given treatment for related ailments. The plaintiffs in this case are facing the loss of their livelihood, their land and their rights to all these, obviously, are more private in nature than the motherly concerns of Mrs Gillick.

[13] On the issue, at hand, we now also have the benefit of reading a very recent decision of the Court of Appeal in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 CLJ 880, where Raus Sharif PCA, held that:

> (1) NCR-related claims is not solely and/or exclusively within the domain of public law. It is a mixture of public and private law. Given that the private law element in NCR-related claims is so great in that it affects the very livelihood of the natives of the state of Sarawak, the private law element is more dominant than the public law element attached to NCR claims. The peculiarity and distinct features of the NCR claims make it an exception to the general principle propounded in *O'Reilly v. Mackman*. Thus, the plaintiffs herein were right in filing this action by way of writ and not by way of judicial review. (para 18)

Conclusion

[14] In view of the recent plethora of cases that held that native customary rights and claims to native land can be commenced by way of writ action, it is to our mind that issue is now trite law.

[15] We also, by way of an *obita dictum*, hold that in the spirit of the fundamental right to property, the courts should be very slow to close the doors to justice when such rights are involved. In fact, the courts should open the door wider in such circumstances.

[16] For the above reasons, we unanimously dismissed the appeals by the appellants. Costs was fixed at RM10,000 for each appeal, in favour of the respective respondent.